



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant : VAN DER MEULEN, J.
Appl. No. : 10/782,806
Filed : February 23, 2003
Title : SET OF CLAVE BLOCKS
Group Art Unit : 2837
Examiner : HSIEH, S.
Docket No. : 1203.080

APPEAL BRIEF UNDER 37 C.F.R. § 41.37

March 26, 2007

Board of Patent Appeals and Interferences
United States Patent and Trademark Office
PO Box 1450
Alexandria, Virginia 22313-1450

Dear Sir:

In follow-up to the Notice of Appeal filed February 26, 2007, Appellant respectfully requests the Board of Patent Appeals and Interferences consider the following arguments and reverse the decision of the Examiner in whole.

The Commissioner is hereby authorized to charge applicant's deposition account no. 50-0548 for any fees necessary to maintain the pendency of this application.

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(1) Real Party in Interest

The real party in interest is PEARL MUSICAL INSTRUMENT CO.

(2) Related Appeals and Interferences

There are no known related appeals or interferences, which will directly affect or be directly affected by or have a bearing on the decision in the pending appeal.

(3) STATUS OF CLAIMS

1. Claims 1-8 are pending in the application.
2. Claims 1-8 have been rejected and are being appealed.

(4) STATUS OF AMENDMENT

The fifth Non-Final Office Action rejecting claims 1-8 was mailed on December 8, 2006. On February 26, 2007 Appellant filed a Notice of Appeal. Subsequently, there have been no other papers filed by the Appellant or issued by the U.S. PTO.

(5) SUMMARY OF CLAIMED SUBJECT MATTER

The instant invention, as claimed in independent claim 1, is directed to a percussion musical instrument comprising a set of clave blocks (10, 20 and 30) (see Figs. 1A, 2A and 3A). Each of the clave blocks (10, 20 and 30) comprises a rigid body (12, 22 and 32) made of a solid material (see amended paragraph beginning at page 4, line 11; page 5, line 1 and page 5, line 13 of the Amendment filed on August 19, 2005). The body (12, 22 and 32) has an open cavity therewithin (14, 24 and 34) defined solely by the solid material (see Figs. 1B, 2B and 3B and 7-8). The bodies (12, 22 and 32) have substantially equal exterior dimensions and different volumes of the open cavities (14, 24 and 34) therewithin provided to generate musical tones of a variety of pitches (see page 6, lines 3-11).

According to claim 2, the set includes three clave blocks including a low pitch clave block (10) provided to generate a low pitch tone, a medium pitch clave block (20) provided to generate a medium pitch tone and a high pitch clave block (20) provided to generate a high pitch tone (see page 4, lines 11-12; page 5, lines 1-2 and 13-14; and Figs. 1A, 2A and 3A).

According to claim 3, a volume of the open cavity of said low pitch clave block of the set is larger than a volume of the open cavity of the medium pitch clave block, and wherein the volume of the open cavity of the medium pitch clave block is larger than a volume of the open cavity of the high pitch clave block (see page 6, lines 6-12).

According to claim 7, the bodies of different volumes have different thickness of the solid material (see amended paragraph beginning at page 6, line 13 of the Amendment filed on August 19, 2005).

According to claim 8, the cavities include openings having different perimeters (see amended paragraph beginning at page 6, line 13 of the Amendment filed on August 19, 2005 and Figs. 1B, 2B and 3B).

(6) GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

Claims 1-4 and 8 stand rejected under 35 U.S.C. §103(a) as being unpatentable over Cohen (USP 3,893,363) (hereinafter referred to as Cohen '363) in view of DeArmas (USP 4,362,080) (hereinafter referred to as DeArmas).

Claims 5 and 6 stand rejected under 35 U.S.C. §103(a) as being unpatentable over Cohen '363 in view of DeArmas, as applied to claim 1 above, and further in view of Cohen et al. (USP 4,898,061) (hereinafter referred to as Cohen '061).

Claim 7 stands rejected under 35 U.S.C. §103(a) as being unpatentable over Cohen '363 in view of DeArmas, as applied to claim 1 above, and further in view of Shimoda et al. (USP 4,779,507) (hereinafter referred to as Shimoda).

(7) ARGUMENTS

Rejection under 35 U.S.C. 103(a) over Cohen '363 and DeArmas

Claims 1-4 and 8 stand rejected under 35 U.S.C. §103(a) as being unpatentable over Cohen '363 in view of DeArmas. It is noted that claim 1 is independent claims. It is also noted that claims 2, 4 and 8 depend upon the base claim 1, and claim 3 depends upon claim 2.

Regarding claim 1: The examiner erroneously alleges that Cohen '363 discloses a set of clave blocks (18, 20, or 22, 24). In fact, Cohen '363 discloses temple blocks 18, 20 and cowbells 22, 24). Those skilled in the art would readily recognize that temple blocks and cowbells, although being percussion instruments, are dissimilar to the clave blocks. At the same time, the Examiner concedes that Cohen '363 does not mention expressly that bodies of the percussion instruments (18, 20, or 22, 24) have substantially equal exterior dimensions and different volumes of open cavities therewithin provided to generate musical tones of a variety of pitches.

The examiner further erroneously alleges that DeArmas teaches “a set of clave blocks, including bodies having open cavities, and substantially equal exterior dimensions and different volumes of said open cavities therewithin provided to generate musical tones of a variety of pitches (col. 3, lines 41-43 and lines 47-49).”

Contrary to the examiner's allegations, DeArmas discloses a single cowbell 10, not a set of cowbells. Furthermore, col. 3, lines 47-49 of DeArmas, cited by the examiner, states that the instrument may be provided with chambers 11 of different sizes or shapes depending

on the particular basic sound and tone desired. However, DeArmas is silent regarding the exterior dimensions of the cowbells. Claim 1 recites the set of bodies of the clave blocks having substantially equal exterior dimensions and different volumes of the open cavities therewithin. As the cowbell 10 is illustrated to be made of a sheet of metal, it would be natural to assume that the cowbells with chambers of different sizes have different exterior dimensions. Thus, the prior art provides no suggestion or motivation to provide a set of clave blocks with bodies having substantially equal exterior dimensions and different volumes of open cavities therewithin provided to generate musical tones of a variety of pitches.

Arguing the rejection of claim 7 in the Office Oction of December 8, 2006, the examiner concedes that Cohen '363 in view of DeArmas teach the percussion instrument including the subject matter discussed above except the bodies of different volumes having different thickness of the solid material. In other words, the examiner concedes that DeArmas teaches the cowbells provided with chambers 11 of different sizes or shapes, but having the same wall thickness. However, if the different cowbells have equal wall thickness and different sizes (volumes) of the internal chamber, they inevitably have different exterior dimensions.

Therefore, even if the combination of and modification of Cohen '363 and DeArmas suggested by the Examiner could be made, the resulting set of clave blocks still would lack the bodies having substantially equal exterior dimensions and different volumes of open cavities therewithin.

The Examiner's assertion that Cohen '363 and DeArmas may be modified to achieve the limitations of the present invention would clearly result from **hindsight reconstruction**, which is not permitted.

Therefore, the rejection of claim 1 under 35 U.S.C. 103(a) is improper.

Regarding claim 2: In addition to the arguments presented above regarding the patentability of claim 1, none of the references cited discloses the set includes three clave blocks including low pitch, medium pitch and high pitch clave blocks. In fact, as argued above, none of the references cited by the examiner discloses a set of clave blocks: Cohen '363 discloses temple blocks 18, 20 and cowbells 22, 24, while DeArmas discloses a single cowbell 10.

Regarding claim 3: In addition to the arguments presented above regarding the patentability of claim 2, none of the references cited discloses the set of low pitch, medium pitch and high pitch clave blocks, wherein a volume of the cavity of said the pitch clave block is larger than a volume of the cavity of the medium pitch clave block, and wherein the volume of the cavity of the medium pitch clave block is larger than a volume of the cavity of the high pitch clave block.

Regarding claim 8: In addition to the arguments presented above regarding the patentability of claim 1, DeArmas fails to disclose that openings in the cavities in the clave blocks have different perimeters.

The examiner alleges that DeArmas teaches that openings of the cavities in the bodies of the cowbells have different perimeters, and refers to col. 3, lines 47-49. However, col. 3, lines 47-49 of DeArmas states only that the instrument may be provided with chambers 11 of different sizes or shapes depending on the particular basic sound and tone desired. However,

DeArmas is silent about perimeters of the openings to the chambers 11. Clearly, the Examiner's assertion results from **hindsight reconstruction**, which is not permitted.

Rejection under 35 U.S.C. 103(a) over Cohen '363, and Shimoda

Regarding claim 7: In addition to the arguments presented above regarding the patentability of claim 1, the cited references fail to disclose that the bodies of different volumes have different thickness of the solid material of the bodies.

The examiner alleges that Cohen '363 and DeArmas teach the percussion instrument including the claimed invention except the bodies of different volumes having different thickness of the solid material.

The examiner further erroneously alleges that Shimoda teaches a wood block, including three plates (21, 22 and 13) of different volumes having different thickness of the solid material. However, those skilled in the art would readily realize that the solid plates (21, 22 and 13) have no internal cavities therewithin, thus no volumes. In fact, Shimoda disclose a single wood block which is very different from the clave blocks of the present invention. Moreover, the plates (21, 22 and 13) of different thickness of Shimoda are parts of the same sound block 20, while claim 7 recites the different clave blocks of different volumes of cavities therein having different thickness of the solid material thereof.

Therefore, even if the combination of and modification of Cohen '363, DeArmas and Shimoda suggested by the Examiner could be made, the resulting set of clave blocks still would lack the bodies of different volumes of open cavities therewithin having different thickness of the solid material.

Therefore, the rejection of claim 7 under 35 U.S.C. 103(a) is improper.

In view of the foregoing, it is respectfully submitted that this application is in condition for allowance, and notice to that effect is earnestly solicited. Appellant will request an oral hearing on the merits within two months after the date of the Examiner's answer.

Respectfully submitted:
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(8) APPENDIX OF CLAIMS ON APPEAL

1. A percussion musical instrument comprising:

a set of clave blocks each comprising a rigid body made of a solid material, said body having an open cavity therewithin defined solely by said solid material;

said bodies having substantially equal exterior dimensions and different volumes of said open cavities therewithin provided to generate musical tones of a variety of pitches.
2. The musical instrument as defined in claim 1, wherein said set includes three clave blocks including a low pitch clave block provided to generate a low pitch tone, a medium pitch clave block provided to generate a medium pitch tone and a high pitch clave block provided to generate a high pitch tone.
3. The musical instrument as defined in claim 2, wherein a volume of said open cavity of said low pitch clave block of said set is larger than a volume of said open cavity of said medium pitch clave block, and wherein said volume of said open cavity of said medium pitch clave block is larger than a volume of said open cavity of said high pitch clave block.
4. The musical instrument as defined in claim 1, wherein said body of at least one of said clave blocks has a mounting ring.
5. The musical instrument as defined in claim 1, wherein said body of each of said clave blocks is made of plastic material.

6. The musical instrument as defined in claim 1, wherein said body of each of said clave blocks is made by injection molding process.

7. The musical instrument as defined in claim 1, wherein said bodies of different volumes having different thickness of said solid material.

8. The musical instrument as defined in claim 1, wherein said cavities include openings having different perimeters.

(9) EVIDENCE APPENDIX

Not applicable

Appl. No. 10/782,806
In re Van Der Meulen, J.

(10) RELATED PROCEEDINGS APPENDIX

Not applicable